



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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In the Matter of Whether 36.04 Acres of Land  
Located in the Town of Easton, Adams County,  
and Owned by John M. and Diane L. Koerner  
Shall be Withdrawn as Forest Croplands

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Case No. IH-01-10

**AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

The Department of Natural Resources on its own motion investigated whether a 36.04 acre parcel of land owned by John M. and Diane L. Koerner in the Town of Easton, Adams County, Wisconsin should be withdrawn as Forest Cropland under Wis. Stat. § 77.10. On November 2, 2001, the Department of Natural Resources filed a Request for Hearing with the Division of Hearings and Appeals. Pursuant to due notice hearing was held on November 28, 2001, at Friendship, Wisconsin, Mark J. Kaiser, administrative law judge, presiding.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

Attorney Edwina Kavanaugh  
P. O. Box 7921  
Madison, WI 53707-7921

John M. and Diane L. Koerner  
5628 West Fisk Avenue  
Oshkosh, WI 54904

**FINDINGS OF FACT**

1. John M. and Diane L. Koerner own a 36.04 acre parcel of land in the Town of Easton. The parcel is located in the NWSW ¼ of S25, T16N, R06E, Town of Easton, Adams County, Wisconsin.

2. In 1968 the Department of Natural Resources (Department) issued Order No. 2632, entering acreage then owned by Arnold W. Schmidt in Section 25, Township 16N, Range 6E, into Forest Cropland effective January 1, 1969. The acreage for which entry was petitioned constituted a tract of land of forty or more acres as required by Wis. Stat. § 77.02(1), (1969-70). The acreage owned by Mr. Schmitz included the 36.04 acres that is the subject of this hearing

3. In December of 1984 Mr. Schmidt recorded a land survey in which the NESW  $\frac{1}{4}$  (listed as 40 acres on Order No. 2632) and the part of NWSW  $\frac{1}{4}$  (listed as 37 acres on the same Order) were combined into a Lot 1 with total acreage for the lot corrected to 73.13 acres. On July 10, 1990, the Department issued Correction Order No. 2632 indicating that 153.13 acres of the original entry in Order No. 2632 remained as Forest Cropland and redesignating certain acreage of the total from "40 acres NESW and 37 acres Part of NWSW" to "Lot 1, Sec. 25 – 73.13 acres" pursuant to the 1984 survey.

4. On August 13, 1990, Valley Trust Company and Robert E. Cook, by personal representative's deed for the estate of Arnold W. Schmidt, transferred the entire 153.13 acres of land to First National Bank of Atlanta as trustee of the First Wachovia Timberland Fund II. Subsequently, on April 22, 1991, the Department issued FCL Transfer Order No. T-3141 transferring said land from Arnold W. Schmidt to the First National Bank of Atlanta, pursuant to Wis. Stat. § 77.10(1)(b), and listing the 73.13 acres portion of the transferred acreage known as Lot 1 as comprised of 36.56 acres in the NESW  $\frac{1}{4}$  and 36.57 acres in the NWSW  $\frac{1}{4}$ .

5. By trustee's deed dated August 29, 1997, the 153.13 acres of land in Correction Order No. 2632 (including the 73.13 acres now known as Lot 1) were transferred from Wachovia Bank (formerly the First National Bank of Atlanta) to Thomas A. Ernstmeyer. On that same date, Mr. Ernstmeyer apparently signed and filed the transfer of ownership and acceptance of transfer for Forest Cropland with the County Register of Deeds rather than with the Department.

6. Also on August 29, 1997, Thomas Ernstmeyer transferred ownership of the property by warranty deed to John M. and Diane L. Koerner, as Trustees of the Koerner Revocable Trust. On November 15, 2000 the Department received a form signed by John and Diane Koerner indicating transfer of ownership of the property to the Koerners and acceptance of the transfer under the Forest Cropland Law.

7. Before issuing a new transfer order, the Department learned that by trustee deed dated June 21, 2000 the Koerners had transferred the NESW portion of the 73.13 acres listed as Lot 1, Sect. 25 in Correction Order No. 2632 to Robert A. and Jill A. Jahn. A survey recorded by the Jahns on September 6, 2000 indicated that the northeast portion of Lot 1 that had been transferred to them comprised 40.10 acres. Transferring the northeast portion of Lot 1 to the Jahns divided the Forest Cropland that the Koerners continue to own into two noncontiguous portions – (1) the NWNE and SWNE portions comprising 80 contiguous acres, and (2) the remaining portion of Lot 1 in the NWSW now comprising less than 40 acres.

8. By letter dated March 28, 2001 the Department advised the Koerners that the NWSW portion of the land no longer qualified as Forest Cropland because it was no longer part of a tract of land of 40 or more acres as required by Wis. Stat. §§ 77.02(1) and 77.10(1) (1969-70), and Wis. Admin. Code § NR 46.07(f). The Department asked the Koerners to voluntarily withdraw the NWSW acreage.

9. The Koerners did not file a voluntary withdrawal. By letter dated September 14, 2001 the Department transmitted three orders to the Koerners. FCL Correction Order No. 01 001 1969 dated September 10, 2001 corrected the legal description and acreage for the land in the North ½ of the SW ¼ under two legal descriptions: 40.10 acres in NESW and 36.04 acres in the NWSW. FCL Transfer Order No. 01 001 1969 dated September 12, 2001 transferred 156.04 acres from Wachovia Bank (formerly First National Bank of Atlanta) to Mr. Ernstmeyer and then to John M Koerner and Diane L. Koerner, as Trustees for the Koerner Revocable Trust. FCL Transfer Order No. 01 003 1969 dated September 12, 2001 transferred 40.10 acres from Koerner Revocable Trust to Robert A. Jahn and Jill A. Jahn.

10. At the same time it transmitted the three orders, the Department advised the Koerners that their transfer to Robert and Jill Jahn divided their remaining Forest Croplands into two noncontiguous parcels – an 80 acre parcel in the NE ¼ which could remain as Forest Cropland, and a 36.04 acre parcel in the NWSW ¼ which was no longer part of a 40 acre contiguous tract and thus ineligible to remain as Forest Cropland. The Koerners declined to withdraw the 36.04 acres voluntarily, so the Department initiated proceedings to withdraw the land under Wis. Stats. § 77.10(1).

11. The subject parcel is ineligible to continue as Forest Cropland under Wis. Stat. § 77.02(1) and is subject to cancellation of its designation as Forest Cropland under Wis. Stat. § 77.10(1).

### Discussion

The relevant facts in this case are not disputed. The Koerners initially purchased a total of 153.13 contiguous acres. After they sold a 40.10 acre parcel to the Jahns, they still owned a total of 116.04 acres. However, their land is divided into two parcels, an eighty acre parcel and a 36.04 acre parcel. A parcel must be forty or more contiguous acres to be maintained as forest cropland. The Koerners have discussed a land swap with the Jahns that would make the subject parcel forty acres and keep the Jahns' parcel at at least forty acres. Apparently, the negotiations between the Jahns and the Koerners have so far not been successful.

The Koerners primary argument at the hearing is that they intended to convert the parcel from Forest Cropland to Managed Forest Land. Pursuant to Wis. Stats. § 77.82(4m)(c), the deadline for a landowner to petition the Department for conversion of the land was January 1, 1998. The Koerners allege that they were told by the former county forester that they had a year from the purchase of the property to petition for conversion (i.e. until August 29, 1998). The Koerners argue they missed the statutory deadline because of the alleged misinformation. The Koerners presented no documentary evidence to support their allegation that the county forester gave them misinformation. However, even if one accepts Mr. Koerner's testimony on this issue,

the Division of Hearings and Appeals has no equitable authority to authorize the conversion of the parcel from Forest Cropland Managed Forest Land after the statutory deadline.

The Koerners argue that if the parcel is withdrawn as forest cropland, the withdrawal tax will be greater than the value of the land. This is unfortunate, especially considering that most of the tax benefit from having the land designated as Forest Cropland was realized by previous owners of the property. However, the controlling statutes are clear and allow no room for discretion. It should also be noted that Mr. Koerner is a commercial tree farmer. He can be expected to know the restrictions for maintaining the parcel as Forest Cropland. Unless the Koerners are able to restore the subject parcel to a size of at least forty acres, the parcel must be withdrawn as Forest Cropland.

### CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and enter necessary orders relating to withdrawal of Forest Croplands pursuant to Wis. Stat. §§ 227.43 and 77.10.

2. To be eligible for entry in the Forest Cropland program in 1968, the owner must practice forestry on “any tract of land of not less than 40 acres.” Wis. Stat. §77.02(1) (1969-70). To continue participation in the Forest Cropland program the tract must remain at least forty acres in size. When a 40.10 acre parcel of the property was conveyed by warranty deed to the Jahns, the remaining 36.04 acre parcel lost its eligibility as Forest Cropland.

3. Lands which cannot meet the eligibility requirements of Wis. Stat. § 77.02(1) and Wis. Admin. Code § NR 46.06 are “ineligible lands” within the meaning of Wis. Admin. Code § NR 46.07(f).

### ORDER

Pursuant to the foregoing Findings of Fact, NOW IT IS HEREBY ORDERED that the land described above owned by John M. and Diane L. Koerner is withdrawn from entry under the Forest Crop law effective January 1, 2002 as provided in Wis. Stat. § 77.10(1).

IT IS FURTHER ORDERED that the tax due by the owner (as determined by the Wisconsin Department of Revenue) and interest thereon shall be paid to the Department of Natural Resources pursuant to Wis. Stat. § 77.10(1)(a).

IT IS FURTHER ORDERED that a copy hereof be transmitted forthwith by the Department of Natural Resources to the Wisconsin Department of Revenue, to the Clerk of the Town of Easton, to the Register of Deeds of Adam County and the Supervisor of Assessments of the property tax assessment district wherein the land is located.

Dated at Madison, Wisconsin on January 9, 2002.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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By: \_\_\_\_\_

Mark J. Kaiser  
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53 to insure strict compliance with all its requirements.